Supreme Court, U.S.
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NO. 80-303

In the Supreme Court of the United States

OCTOBER TERM, 1979

WILL RENFRO,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit rendered June 30, 1980, in case No. 79-5457

QUESTION PRESENTED

Did the District Court's refusal to allow the defendant to cross-examine the government's principal witness concerning previously expressed bias, and the court's instruction to the jury to disregard that line of questioning, constitute reversible error and a violation of the defendant's Fifth and Sixth Amendment rights?

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OPINIONS BELOW

Petitioner Will Renfro was convicted of an assault upon a federal officer (18 U.S.C. 111) in the U. S. District Court for the Northern District of Mississippi and appealed to the U. S. Court of Appeals for the Fifth Circuit. The judgment of conviction was affirmed by the Fifth Circuit in opinion No. 79-5457 issued on June 30, 1980.

GROUNDS FOR JURISDICTION

On June 30, 1980, the U. S. Court of Appeals for the Fifth Circuit affirmed a judgment of conviction against petitioner. Petitioner seeks review by this court pursuant to 28 U.S.C. 1254 (1) and Rule 17.1 (a), Rules of the Supreme Court.

PROVISIONS INVOLVED

Constitution of the United States, Fifth Amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling him.

STATEMENT OF THE CASE

Federal investigators conducted an investigation in DeSoto County, Mississippi, for approximately three years involving alleged bribes received by county officials including petitioner, County Supervisor Will Renfro. Mr. Renfro contends that the F.B.I. agents, particularly Agent Tichenor, were frustrated and angered by their inability to secure enough evidence for an indictment.

On May 9, 1979, Petitioner Renfro met Agent Tichenor in the hall of the DeSoto County Courthouse at Hernando, Mississippi. Agent Tichenor said that Mr. Renfro lifted him off the floor, threw him down and tried to vigorously twist his head off. Petitioner Renfro testified that Agent Tichenor slipped on some sawdust on the floor and that he picked Tichenor up from the floor. No other persons saw this incident although other courthouse employees arrived on the scene within seconds. Agent Tichenor was not injured and the entire incident lasted only a few seconds.

Mr. Renfro was indicted and tried for assaulting a Federal officer. His attorney, pursuant to Rule 607, attempted to cross-examine Agent Tichenor regarding the agent's prior statements of bias and prejudice against Mr. Renfro in an effort to attack the agent's credibility. The District Court, relying on Rule 403, halted the line of questioning and immediately instructed the jury to disregard it:

THE COURT:

> Now, members of the jury, I am going to ask that you disregard this line of questioning. Has nothing to do with the charge you are here about today. Let's get back to what happened on May 9. That is what we are here to try, who did what and when.

The Court, after hearing argument of counsel in chambers, ruled that although it may be relevant, evidence of this kind "has its probative value substantially outweighed by the prejudice, by the danger of unfair prejudice and confusion of the jury . . ."

The particular testimony sought by defense counsel, and denied by the Court, involved whether Agent Tichenor had offered immunity to three propective witnesses if they would testify that they had paid bribes to County Supervisor Renfro.

Petitioner Renfro was convicted in the District Court and appealed to the U. S. Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the conviction and dismissed petitioner's argument on the ground that if the impeachment line of questioning had been pursued, it would have "wasted valuable time and judicial resources" and "such a clash would have operated to confuse and mislead the jury."

ARGUMENT

The appeals court decision affirming the denial of the right of a full cross-examination for impeachment purposes, and the lower court's admonition to the jury to disregard that line of questioning, appears to be in direct opposition to a prior decision of the Supremem Court. In assessing the impact of the lower court's action, it is important to note that Agent Tichenor was the only witness, aside from Petitioner Renfro, to the alleged assault although other witnesses arrived on the scene within seconds and saw both men on the floor.

The Supreme Court held in *Davis v. Alaska,* 415 U.S. 309 (1974) that it is a violation of a criminal case defendant's Sixth Amendment right to confront witnesses against him to restrict his defense in developing the issue of bias before the jury. The trial court in the *Davis* case had limited the defense to asking the main prosecution witness if he was biased.

> Counsel was unable to make a record from which to argue *why* Green might have been biased *or* otherwise lacked that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness . . . Defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. 415 U.S. at 318.

The lower court not only prevented Renfro from pursuing indications that Agent Tichenor had offered immunity to prospective witnesses if they would swear that they had paid bribes to Renfro, but admonished the jury to disregard that entire line of cross-examination. Petitioner contends that this court action was also in violation of the due process clause of the Fifth Amendment.

The lower court's admonition to defense counsel and the jury to "disregard this line of questioning" tended to strengthen Agent Tichenor in the minds of the jury and indicated to them that the court believed the impeachment evidence was untrue or else that it was totally unimportant. There is considerable reason to believe that this error contributed to the jury's verdict, and in such cases the conviction must be set aside. *Kotteakos v. United States,* 328 U.S. 750 (1946); *Chapman v. California,* 386 U.S. 18 (1967).

The Court of Appeals should not have sanctioned this departure from a prior decision of the Supreme Court.

Respectfully submitted,

/S/ William M. Pace

WILLIAM M. PACE
Attorney for Petitioner

CERTIFICATE OF SERVICE

In compliance with the Rules, I certify that I have served three copies of the above petition for writ of certiorari upon Mr. H. M. Ray, United States Attorney, P. O. Box 886, Oxford, Mississippi 38655, and three copies to the Solicitor General, Department of Justice, Washington, D.C. 20530, by first class mail.

This the _____day of August 1980.

/S/ William M. Pace

WILLIAM M. PACE

APPENDIX A

A-1

United States of America vs.

United States District Court for

DEFENDANT: WILL E. RENFRO

NORTHERN DISTRICT OF MISSISSIPPI

DOCKET NO. CRD79-34-K

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: Aug. DAY: 8 YEAR: 1979

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Hon. T. Hal Freeland and Hon. G. A. Gafford, Oxford, MS (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea. [ ] NOLO CONTENDERE. [X] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of §§ 111 and 1114, Title 18, United States Code (assaulting an FBI agent), as charged in Count 1 of the Indictment.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Eighteen (18) months.

Under the Voluntary Surrender Plan the defendant shall report on his own to the institution designated for his confinement as directed by the Clerk at the appropriate time. In any event, however, this sentence is stayed until September 1, 1979.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

William C. Keady

WILLIAM C. KEADY, Chief Judge

Aug. 8, 1979

APPENDIX B

A-2

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILL RENFRO,
Defendant-Appellant.

No. 79-5457.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

JUNE 30, 1980.

Defendant was convicted in the United States District Court for the Northern District of Mississippi, William C. Keady, J., of assaulting an FBI agent engaged in performance of his official duties, and he appealed. The Court of Appeals, Sam D. Johnson, Circuit Judge, held that: (1) defendant, who did not challenge magistrate's ruling on discovery motion until after trial, was not entitled to raise issue on appeal; (2) in prosecution of defendant for assaulting FBI agent who was engaged in an investigation of defendant's alleged involvement in racketeering and acceptance of kickbacks in his capacity as

member of county board of supervisors, trial court did not abuse its discretion in excluding evidence indicating that FBI agent had offered other county officials immunity if they would testify against defendant on grounds that probative value of such evidence was substantially outweighed by danger of unfair prejudice; and (3) where defendant, during direct testimony, chose to completely reenact his version of the assault, trial court did not abuse its discretion in permitting Government, on rebuttal, to reenact its version of the assault in response to defendant's presentation.

Affirmed.

1. United States Magistrates

Appeals from magistrate's ruling must be to district court.

2. Federal Courts

Appellate courts are without jurisdiction to hear appeals directly from federal magistrates.

3. Criminal Law

Defendant, who did not challenge magistrate's ruling on discovery motion until after trial, was not entitled to raise issue on appeal from his conviction for assaulting an FBI agent engaged in performance of his official duties.

4. Assault and Battery

Instruction given on forcible assault, which required jury to view the "fear" and "expectation of immediate bodily harm" from standpoint of victim, was not erroneous.

5. Criminal Law

Trial judge's determination that potential prejudice outweighs probative value of evidence will be reversed by Court of Appeals only if exclusion constitutes an abuse of discretion. Fed.Rules Evid. Rule 403, 28 U.S.C.A.

6. Criminal Law

In prosecution of defendant for assaulting FBI agent who was engaged in an investigation of defendant's alleged involvement in racketeering and acceptance of kickbacks in his capacity as member of county board of supervisors, trial court did not abuse its discretion in excluding evidence indicating that FBI agent had offered other county officials immunity if they would testify against defendant on grounds that probative value of such evidence was substantially outweighed by danger of unfair prejudice. Fed.Rules Evid. Rule 403, 28 U.S.C.A.

7. Witnesses

Where defendant called four character witnesses who testified about defendant's good reputation for honesty and integrity in the community and for peace and quiet in the community, trial court did not err in permitting prosecutor, on cross-examination, to ask witnesses whether they had heard about specific prior instances when defendant acted dishonestly or violently.

8. Criminal Law

In prosecution of defendant for assaulting FBI agent engaged in performance of his official duties in which defendant, during direct testimony, chose to completely reenact his version of the assault, trial court did not abuse its discretion in permitting Government, on rebuttal, to reenact its version of the assault in response to defendants's presentation.

9. Criminal Law

Trial judge has authority within limits to control scope of rebuttal testimony.

Appeal from the United States District Court for the Northern District of Mississippi.

Before GODBOLD, TJOFLAT and SAM D. JOHNSON, Circuit Judges.

SAM D. JOHNSON, Circuit Judge:

Will Renfro is a former defensive tackle for the Washington Redskins, Pittsburgh Steelers, Philadelphia Eagles, and New York Giants. On May 9, 1979, Renfro was involved in an incident with FBI Agent Wayne Tichenor. Renfro's actions produced an indictment and conviction for assaulting an FBI agent engaged in the performance of his official duties.[1] We affirm that conviction.

This case stems from an FBI investigation into alleged racketeering and acceptance of kickbacks by the five elected members of the DeSoto County Board of Supervisors. Defendant Renfro was a member of the County Board in May 1979 and Agent Tichenor was actively involved in the investigation into the County Board. On May 9, 1979, Agent Tichenor was in the DeSota County Courthouse interviewing clerks and reviewing county records for evidence against defendant Renfro. Shortly after noon, Tichenor left the chancery clerk's office on the second floor to interview another witness in the Renfro investigation. Within seconds of the agent's exit, employees in

1. *See* 18 U.S.C. § 111.

the clerk's office heard a loud noise in the hall. When they got to their office door, the employees saw Agent Tichenor lying on the floor with defendant Renfro on top of him.

The Government's position at trial was that Renfro, angered by the FBI investigation, picked Tichenor up and threw him to the floor. Only Agent Tichenor observed the assault. The prosecution did introduce, however, testimony from the courthouse employees who stated that they arrived in the hallway within seconds of the alleged assault. These witnesses testified that they saw Renfro on top of Tichenor holding him on the floor. One witness stated that it looked like Renfro had his hands around Tichenor's neck "chocking him." Another witness said it appeared that Renfro was about to hit Tichenor.

The defendant's position at trial was that the agent accidentally slipped and fell on the sawdust covered floor. Renfro testified that had the events described by Agent Tichenor actually occurred, Tichenor would have been severely injured. Renfro contended that Tichenor was frustrated by his inability to obtain a conviction against any of the members of the DeSoto County Board of Supervisors, and was willing to lie about the accident in order to garner some type of conviction against one of the supervisors.

On July 11, 1979, after a two day trial, the jury returned a verdict finding the defendant guilty as charged. The district court entered judgment and ordered that Renfro be incarcerated for 18 months. Defendant then instituted this appeal, raising six procedural and evidentiary points of error.

PROCEDURAL POINTS OF ERROR

A. *The Discovery Order*

Prior to trial, defendant made a motion pursuant to F.R.Crim.P. 16 and *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1962), requesting that the United States produce and permit defendant to inspect and copy a wide range of materials and evidence. The items requested in this motion included materials that the Government had compiled relating to the assault charge, and materials that the Government had obtained in its investigation into the defendant *in his capacity as a member of the Board of Supervisors of DeSoto County.*

Defendant presented this discovery motion to a federal magistrate prior to trial. He sought to justify discovery of materials from the investigation into his activities as a member of the Board of Supervisors on the ground that such information was needed to show Agent Tichenor's bias. After a full hearing, the magistrate ruled that Renfro could not examine the information from the investigation into his activities as a

member of the Board of Supervisors. Defendant never appealed this order to the district court prior to trial. Defendant first raised the possibility that the magistrate erred in a post-trial motion.

[1-3] 28 U.S.C. § 636(b)(1)(A) provides that a judge may request that a magistrate hear pre-trial matters pending before the judge, including discovery motions in criminal trials. Appeals from the magistrate's ruling must be to the district court. *United States v. Reeds,* 552 F.2d 170 (7th Cir. 1977) (per curiam). In the case at bar, while Renfro did appeal the magistrate's ruling to the district court, he did not do so until after trial. This delay deprived the trial judge of his ability to effectively review the magistrate's holding. In essence then, defendant is now appealing a magistrate's decision directly to this Court. The law is settled that appellate courts are without jurisdiction to hear appeals directly from federal magistrates. *Id.; United States v. Cline,* 566 F.2d 1220, 1221 (5th Cir. 1978); *United States v. Haley,* 541 F.2d 678 (8th Cir. 1974). Accordingly, this part of defendant's appeal must be dismissed.

B. *The Jury Charge*

[4] Defendant's final procedural point of error is his contention that the trial judge erroneously defined forcible assault in the jury charge. The charge defines forcible assault as:

any willful threat or attempt to inflict bodily injury upon the person of another when coupled with an apparent present ability to do so, and includes any intentional *display of force such as would give the victim reason* to fear or expect immediate bodily harm (emphasis added). Defendant contends that this instruction was invalid because it required the jury to view the "fear" and "expectation of immediate bodily harm" from the standpoint of the *victim*. Renfro argues that the proper charge for forcible assault should ask whether the intimidating actions "would have caused fear of injury to a *reasonable man*." In *Shaffer v. United States*, 308 F.2d 654 (5th Cir. 1962) and *United States v. Marcello*, 423 F.2d 993 (5th Cir.), *cert. denied*, 398 U.S. 959, 90 S.Ct. 2172, 26 L.Ed.2d 543 (1970), this Circuit, in *dicta*, approved the instruction given by the district court. Defendant's arguments do not convince us that this twice-approved charge is now incorrect. This point of error is overruled.

EVIDENTIARY POINTS OF ERROR

A. *The Cross-Examination of Agent Tichenor*

During cross-examination, defense counsel sought to ask Agent Tichenor about his conversations with Lee Harris, Malcolm Harris, and William Harris (the Harris brothers) during the FBI investigation into the alleged racketeering and corruption in DeSoto County. Counsel sought to elicit testimony from Tichenor that he (Tichenor) had offered the Harris brothers immunity from prosecution for accepting payoffs if they would testify against Renfro and other members of the Board of

Supervisors. The trial judge refused to allow this cross-examination. Defendant contends that this refusal limited his ability to establish Tichenor's bias and constitutes reversible error.

[5] The trial judge based his decision to limit defendant's cross-examination on Federal Rule of Evidence 403. Rule 403 provides that a judge may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." A trial judge's determination that potential prejudice outweighs the probative value of evidence will be reversed by this Court only if the exclusion constitutes an abuse of discretion. *United States v. Authement,* 607 F.2d 1129 (5th Cir. 1979) (per curiam). In the case at bar, the trial court did not abuse its discretion.

[6] The district court could reasonably have concluded that the evidence sought had minimal probative value. First, testimony from Agent Tichenor that he had offered the Harris brothers immunity would have, at best, only a slight tendency to establish bias. Second, to the extent that Tichenor's offer of immunity would indicate some bias, that bias was also established: (a) by testimony from Tichenor on cross-examination that he had been active in the FBI investigation into the alleged racketeering in DeSoto County for three years and (b) by questions posed to Tichenor on cross-examination asking whether he had ever said that the FBI had enough "on Will Renfro to hang him."

In examining the other side of this scale, the trial judge could reasonably have concluded that the potential prejudice posed by the evidence was substantial. Had the trial court allowed defense counsel to proceed with the proposed line of questioning, the Government would undoubtedly and understandably have sought to introduce evidence to rebut the defendant's allegation. In the end, the trial might have devolved into a lengthy dispute about the racketeering charges and the FBI's investigation into Renfro and other parties. Aside from wasting valuable time and judicial resources, such a clash would have operated to confuse and mislead the jury.

Defendant was being tried for assaulting an FBI agent. Although evidence of the agent's bias was relevant, the trial judge was reasonable in concluding that the prejudice posed by defense counsel's proposed line of questioning exceeded the probative value. *See e. g., Howell v. American Live Stock Insurance Co.*, 483 F.2d 1354 (5th Cir. 1973). We cannot say that the trial court abused its discretion.

B. *The Introduction of Extrinsic Evidence*

Since the trial court refused to allow defense counsel to cross-examine Agent Tichenor about his offer of immunity to the Harris brothers, the defendatnt sought to call the brothers as witnesses. Defendant intended to elicit testimony from the Harris brothers that Tichenor was out to get the DeSoto

County Board of Supervisors, and that he was determined to see them, Renfro included, in jail. Defendant contends that the trial court erred in refusing to allow the Harris brothers to testify.

A review of the record, however, indicates that *defense counsel* decided not to put the Harris brothers on the witness stand. The record reflects that defense counsel made this tactical decision after the Government stated that if the Harris brothers testified, it would introduce rebuttal evidence. The Government indicated that its rebuttal evidence would include five witnesses who were present at the interviews between the FBI and the Harris brothers. Apparently, all of the witnesses were willing to testify that Agent Tichenor never made any of the statements attributed to him.

In light of the Government's proposed rebuttal testimony, defense counsel chose not to call the Harris brothers to the stand. Defendant cannot now contend that the trial court erred in excluding this testimony. This point of error is overruled.

C. *Specific Instance Testimony*

[7] At trial, defendant called four character witnesses. These witnesses testified about defendant's good reputation for "honesty and integrity in the community" and for "peace and

quiet in the community." On cross-examination, the Government asked the witnesses whether they had heard about specific prior instances when defendant Renfro acted dishonestly or violently. Defendant contends that the district court erred in allowing the Government to question the character witnesses about specific instances of alleged misconduct by Renfro.

In *United States v. Wells,* 525 F.2d 974 (5th Cir. 1976), this Court stated:

> Once a witness has testified concerning a defendant's good character, it is permissible during cross-examination to attempt to undermine his credibility by asking him whether he has heard of prior misconduct of the defendant which is inconsistent with the witness' direct testimony . . . Courts have imposed two important limitations upon judicial discretion in admitting inquiries concerning such prior misconduct: first, a requirement that the prosecution have some good faith factual basis for the incidents inquired about [Citations omitted] and second, a requirement that the incidents inquired about are relevant to the character traits involved at the trial.

Id. at 976, 977. *See also United States v. Bynum,* 566 F.2d 914 (5th Cir. 1978). Defendant does not contend that the prosecution lacked a good faith factual basis for the incidents inquired about or that the incidents were not relevant to the character traits involved at the trial. Renfro's contention that the district court erred in allowing this line of questioning must be rejected.

D. *Rebuttal Evidence*

[8] Agent Tichenor, during the Government's case-in-chief, described and demonstrated by arm movements the actions that he and Renfro took during the assault. Defendant Renfro, during direct testimony, chose to completely re-enact his version of the assault. During rebuttal, the Government re-enacted its version of the assault in response to defendant's presentation. On appeal, defentant contends that the trial court abused its discretion in allowing the Government to present this second re-enactment.

[9] The trial judge has the authority, within limits, to control the scope of rebuttal testimony. *Geders v. United States,* 425 U.S. 80, 86, 96 S.Ct. 1330, 1334, 47 L.Ed.2d 592 (1976). The trial judge did not abuse his discretion when he allowed the Government to re-enact the assault.

CONCLUSION

The judgment entered by the district court is

AFFIRMED.









